M HASHIMI IBRAHIM

v.

ASIA COMMERCIAL FINANCE (M) BHD

HIGH COURT MALAYA, KUALA TERENGGANU
NIK HASHIM J
[BANKRUPTCY NO: 29-289-1999]
30 JUNE 2001

HIRE PURCHASE: *Ownership - Goods under hire purchase - Whether an option to purchase in a hire purchase agreement was itself a "property" under s. 2 of the Bankruptcy Act 1967*

CONTRACT: *Option to purchase - Consideration - Whether hirer conferred an option to purchase goods in hire purchase agreement - Whether such option to purchase is "property" as defined under s. 2 of the Bankruptcy Act 1967*

BANKRUPTCY: *Secured creditor - Proceedings outside bankruptcy - Whether respondent creditor a secured creditor - Whether ownership claim on goods' registration card a security for debt - Effect of s. 5(2) of the Bankruptcy Act 1967 - Whether must be complied with strictly - Whether failure to comply fatal to petition*

The appellant debtor appealed against the decision of the learned senior assistant registrar ('SAR') who dismissed the appellant's notice to oppose the respondent creditor's petition for bankruptcy. The bankruptcy proceeding against the appellant was based on the judgment in default for certain monies obtained by the respondent against the appellant arising from a hire-purchase agreement entered between them for the purchase of a truck. The issues that arose for determination were whether: (i) the option to purchase in a hire purchase agreement was itself a property under s. 2 of the Bankruptcy Act 1967 ('the Act'); and (ii) whether the respondent was a secured creditor.

Held:

[1] The option to purchase in a hire-purchase agreement is itself a property. Even though no property in the truck had passed to the appellant, the option to purchase the truck by the appellant was his interest in the truck. As such, it was "property" as defined under s. 2 of the Act. (p 31 b)

[2] By adopting the arrangement of a hire purchase agreement and endorsing the ownership claim on the registration card of the truck, the respondent was therefore a secured creditor under the Act. (p 31 c)

[2b] Being a secured creditor, the respondent should have stated the truck under the hire purchase agreement as a security in the petition, as provided for in s. 5(2) of the Act. Incidentally, the respondent failed to state that in its petition. Section 5(2) is mandatory in its provision; therefore it must be complied with strictly. Thus, the failure to comply with this requirement was fatal to the respondent's petition. (p 31 d-e)

[Appeal allowed with costs; Orders of the learned SAR set aside.]

Case(s) referred to:
Credit Corporation (M) Bhd v. The Malaysia Industrial Finance Corpn & Anor [1976] 1 MLJ 83 ***(not foll)***
Helby v. Matthews [1895] AC 471 ***(refd)***
Lee v. Butler [1893] 2 QB 318 ***(foll)***
Perwira Habib Bank Malaysia Bhd v. Samuel Pakianathan [1993] 3 CLJ 349 ***(refd)***
United Engineers v. Lai Ping Yoon [1968] 1 MLJ 189 ***(foll)***

Legislation referred to:
Bankruptcy Act 1967, ss. 2, 5(2), 48(1)(b)(i), (ii), (iii)

Bankruptcy Act 1914 [UK], s. 38(a)

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, vol 22, para 124

For the appellant - Rajoo D Moothy; M/s Peter Lai, Rajoo & Aiza
For the respondent - Teo Siaw Peng; M/s KP Ong, Teo & Lim

Reported by Raja Vishnu Sivarajah

JUDGMENT

Nik Hashim J:

The Appeal

This is an appeal against the decision of the learned senior assistant registrar (the SAR) given on 26 September 2000 dismissing with costs the appellant debtor's notice to oppose at encl. 8A (the notice) the respondent creditor's petition (the petition) at encl. 3A. The bankruptcy proceeding against the appellant debtor was based on the judgment in default for a sum of RM103,310.92 obtained by the respondent creditor against the appellant debtor arising from a hire purchase agreement dated 17 October 1995 entered between them for the hire purchase of a tipper dump truck (the truck) as per terms and conditions contained in the said agreement.

According to s. 5 schedule C to the Bankruptcy Act 1967 (the Act), the respondent creditor must state in his affidavit whether he is or is not a secured creditor. And according to s. 5(2) of the Act, the respondent creditor is required to state in the petition that if he is a secured creditor he must either state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudged bankrupt or give an estimate of the value of his security.

In the said petition at encl. 3A, the respondent creditor stated at para. 3 of the statement:

> That we do not nor does any person on our behalf hold any security in the said debtor's estate or any part thereof for the payment of the said sum.

The appellant debtor disputed the above statement contending that the respondent creditor does in fact hold a security in that the appellant debtor has an interest in the truck as a beneficial owner whilst the respondent creditor being the legal owner.

The issue here is to determine whether under s. 5(2) of the Act, the respondent creditor, who is the financier owner of the truck, is a secured creditor in the hire purchase contract.

The learned SAR ruled that the respondent creditor was not a secured creditor. Hence the appeal.

Contentions Of Counsel

Before me, Encik Rajoo D. Moothy, learned counsel for the appellant debtor, argued that goods under a hire purchase agreement, where the financier owner (referring to the respondent creditor) terminates the agreement and sues for the full sum payable under the agreement, must be goods belonging to the hirer. If this is not the case the financier owner will have the best of both worlds, ie, adjudge the hirer a bankrupt based on a certain judgment sum, and still claim rights over the goods. Counsel further submitted that the respondent creditor is a secured creditor by adopting the arrangement of a hire purchase agreement and endorsing "hakmilik dituntut oleh" (ownership claim by) on the registration card (exh. H1 to encl. 11A). By this arrangement the respondent creditor holds on to the goods as a security for a debt. If the respondent creditor were the absolute owner of the goods, why then there is a need for endorsement "hak milik dituntut oleh" on the truck registration card? Since there is no evidence that the respondent creditor has withdrawn the endorsement, the respondent creditor therefore ought to have stated in statement number 3 of the petition that the respondent held security for payment.

Encik Teo Siaw Peng for the respondent creditor, on the other hand, submitted that in hire purchase transaction, until the hirer had exercised his option to purchase the property by paying all the instalments due and fulfil all his obligations under the agreement, the property does not pass to the hirer. Learned counsel cited *Credit Corporation (M) Bhd v. The Malaysia Industrial Finance Corpn. & Anor* [1976] 1 MLJ 83 in support. He urged the court to rule that the wide definition of "property" in the goods to be limited to the property belonging to the bankrupt. He concluded by saying that since the truck was not held by the respondent creditor as security from the appellant debtor by way of mortgage, charge or lien on the property of the debtor, non-statement of the security in para. 3 of the respondent creditor's petition is not fatal and as such, he urged the court to dismiss the appeal with costs.

Findings Of The Court

I, with respect, find much merit in Encik Rajoo's contentions.

In this particular case, the parties have entered into a hire purchase agreement which is contractual in nature. In *United Engineers v. Lai Ping Yoon* [1968] 1 MLJ 189 Gill J, (as he then was) discussed the development and nature of hire purchase transactions and reference was made to *Lee v. Butler* [1893] 2 QB 318 and *Helby v. Matthews* [1895] AC 471 and at p. 194 second column, the learned judge said as follows:

> A hire-purchase agreement is more than a simple contract of hire, for it confers upon the hirer an option to purchase the goods. Thus a bailment coupled with an option to buy, as in *Helby v. Matthews*, is clearly a hire-purchase agreement. By granting the option, the owner makes an irrevocable offer to sell the goods to the hirer if the conditions laid down in the agreement are fulfilled. On his part, however, the hirer is under no obligation to buy the goods. He may exercise the option, that is to say, may accept the offer once he has fulfilled the conditions, if he so wishes, but he may also elect to terminate the hiring and return the goods to the owner without buying the goods. He has a power to accept the offer, but is not bound to do so. The importance of the option to purchase lies in the fact that the hirer is unable to pass a good title to a third party, because he is not a person who has bought or agreed to buy the goods. Since the property in the goods remains in the owner who lets them on hire, the retention of the ownership of the goods and the inability of the hirer (except in special circumstances) to pass a good title provide the owner with some measure of **security** in case the hirer defaults. The hirer, on the other hand, obtains the benefit of a credit transaction in that he receives the possession and use of the goods in advance of the payment of the price, and is enabled to purchase the goods once the price has been paid. (See Guest on the *Law of Hire-Purchase*, pages 10 and 11, paragraphs 23 and 25). (emphasis added).

Thus, in the hire purchase agreement, the hirer gives the financier owner a charge on the goods as security for payment.

In order to resolve the rival contentions of the learned counsel, perhaps it is useful to examine the relevant provisions of the Act.

Section 2 of the Act defines:

> "Property" includes money, goods, things in action, land and every description of property, whether real or personal and whether situate in Malaysia or elsewhere; also obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as above defined.

and,

> "Secured creditor" means a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor but shall not include a plaintiff in any action who has attached the property of the debtor before judgment.

Whereas the description of the bankrupt's property divisible amongst the creditors are provided under s. 48 of the Act which states:

> (1) The property of the bankrupt divisible among his creditors, and in this Act referred to as the property of the bankrupt:
>
> (a) shall not comprise the following:
>
> (i) property held by the bankrupt on trust for any other person;
>
> (ii) the tools, if any, of his trade and the necessary wearing apparel and bedding and other like necessaries of himself, his wife and children to a value inclusive of tools and apparel and the other things aforesaid not exceeding five thousand ringgit in the whole;
>
> (b) shall comprise the folowing:
>
> (i) all such property as belongs to or is vested in the bankrupt at the commencement of the bankruptcy or is acquired by or devolves on him before his discharge; and
>
> (ii) the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge; and

(iii) subject to the provisions of the law for the time being in force relating to bills of sale, all goods being at the commencement of the bankruptcy in the posession, order or disposition of the bankrupt by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof.

(2) Things in action other than debts due or growing due to the bankrupt in the course of his trade or business shall not be deemed goods within the meaning of this section.

The term "property" under the Act is wide in its meaning. Therefore, I, with respect, do not agree with Encik Teo's submissions that "property" in the goods must be limited to the property belonging to the bankrupt as provided for under s. 48(1)(b)(i) without considering the words in sub-ss. (ii) and (iii) thereof. The sub-ss. (i), (ii) and (iii) must be read conjunctively as they are connected by the word "and" at the end of sub-ss. (i) and (ii), of s. 48(1)(b).

In the present case, to clothe the respondent creditor as a "secured creditor" under s. 5(2) it must be shown that the respondent creditor was holding a mortgage, charge or lien on the property of the appellant debtor, as a security for the debt due to the respondent creditor from the appellant debtor (see *Perwira Habib Bank Malaysia Bhd v. Samuel Pakianathan* [1993] 3 CLJ 349 SC).

The case of *Credit Corporation (M) Bhd*, *supra*, which ruled that no property in the car passed to the hirer, until the hirer had exercised his option to purchase the car by paying the total rentals and fulfilling all his obligations under the hire purchase agreement, is not quite applicable to the instant case as there, the question of "secured creditor" was never discussed.

Both counsel informed me that there seems to be no direct Malaysian authority deciding the issue of whether or not a financier owner in a hire purchase agreement is a secured creditor. However, I was referred by Encik Rajoo to para. 124 vol. 22 of the 4th edn of *Halsbury's Laws of England*, where it was stated:

124. Effect of bankruptcy of debtor or hirer.

Upon the making of an adjudication order against the bailee of goods under a credit or hire agreement, it is his property in the goods[2] ...

Further down the passage there was a note:

2 Bankruptcy Act 1914, s. 38(a). This would include the option to purchase in a hire purchase agreement.

It is pertinent to note that s. 38(a) of the English Bankruptcy Act 1914 is identical to our s. 48(1)(b)(i) of the Act.

Therefore, in my judgment, the option to purchase in a hire purchase agreement is itself a property. This accords well with the wide definition of "property" in the Act. Thus, in the instant case, even though no property in the truck has passed to the appellant debtor, the option to purchase the truck by the appellant debtor is his interest in the truck. As such, it is property as defined under s. 2 of the Act. Since the endorsement of ownership claim has not been withdrawn and cancelled, the respondent creditor must be holding on to the ownership claim of the truck as a security for the debt to the respondent creditor from the appellant debtor. By adopting the arrangement of a hire purchase agreement and endorsing the ownership claim by the respondent creditor ("hak milik dituntut oleh") on the registration card, the respondent creditor, which is the financier owner of the truck, is therefore a secured creditor under the Act. Being a secured creditor, the respondent creditor should have stated the truck under the hire purchase agreement as a security at para. 3 in the petition, giving its estimated value or stating that it has a security which it is willing to give up as provided for in s. 5(2) of the Act. In the present case, the respondent creditor failed to state that in its petition. Section 5(2) is mandatory in its provision; therefore it must be complied with strictly.

Conclusion

Thus, the failure to comply with the requirement is fatal to the petition. The appeal is allowed with costs and the orders of the learned SAR are hereby set aside. The petition is dismissed.